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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA MICHAEL DEMONGIN, Defendant and Appellant.	G055411 (Super. Ct. No. 15NF3420) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Michael J. Cassidy, Judge. Affirmed.

Kevin J. Lindsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Joshua Michael Demongin guilty of one count of first degree residential burglary. (Pen. Code, §§ 459, 460, subd. (a).)[1] He was sentenced to the low term of two years in state prison.

Defendant admitted he broke into his ex-girlfriend's apartment and stole two items. But he testified in his own defense that he did not form the intent to steal her property until after he broke in, which would not amount to burglary. The jury found otherwise. On appeal he raises a single claim: that CALCRIM No. 361 was given in error. CALCRIM No. 361 instructs the jury that, if a defendant testifies and fails to explain or deny incriminating evidence, the jury may consider that failure in evaluating the evidence. Defendant argues the instruction was prejudicial because the case turned on his credibility.

We approach this case in the opposite of our usual order: we assess prejudice before turning to the merits. Defendant did not object to CALCRIM No. 361 at trial, which means he forfeited his argument unless the giving of CALCRIM No. 361 affected his substantial rights. Whether an instruction affected substantial rights is analyzed under the *Watson*[2] standard of prejudice: Is it more likely than not that giving the instruction affected the outcome of the trial?

We conclude no, it was not. The carefully circumscribed language of CALCRIM No. 361 coupled with its common-sense message renders the instruction harmless in most circumstances. There was nothing about this case that was particularly susceptible to being influenced by CALCRIM No. 361. The prosecution's case turned largely on defendant's failure to mention his purported motive in various e-mail exchanges with the victim in the weeks following the break in. It did not turn on defendant's failure to explain anything while on the stand, and the prosecutor did not

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[1] All statutory references are to the Penal Code.

[2] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

mention the instruction during closing argument. Accordingly, we conclude the claim of instructional error was forfeited (and would, in any event, not be prejudicial error).

FACTS

Defendant and the victim lived in the same apartment complex, but in separate apartments. The victim also lived with a roommate.

In early 2015, defendant and the victim began what would be a short-lived dating relationship. Defendant and the victim broke up only a few months later, and defendant did not take the breakup well. He continued to text and call the victim to rekindle the romance. His efforts proved a fleeting success as the two began dating again around July 2015, but as of November 15 of that year, the relationship ended once and for all. Defendant testified that he was "pretty confused [and] disappointed" about the relationship ending a second time. That day, the victim e-mailed defendant asking for him to lend her a vaporizer, to which he agreed. Also in his response, he asked for her to return his lighter. She said she would but asked him not to e-mail her anymore.

On Thanksgiving, in 2015, the victim and her roommate both left their apartment to spend the holiday with their families. The roommate recalled she was the last one to leave the apartment that day and left the apartment window slightly open and the blinds open. During that evening, defendant shimmied along a narrow ledge on the second story wall to the apartment's window and broke in. He stole two items from the victim: a bottle of perfume, and her passport.

Upon returning to the apartment the next day, the roommate noticed the window screen was bent, the window was closed, the blinds were closed, and there was a black handprint on the wall near the window. The roommate checked the apartment to see if anyone was inside, which there was not. The roommate also stated that nothing of hers was missing from the apartment. When the victim returned to the apartment, she did

not notice anything missing at first, but two days later she noticed her bottle of perfume was gone. During the time the victim dated defendant, she wore this perfume every day, and defendant would tell her how much he liked it.

On December 10, defendant e-mailed the victim, "Why do you hate me? Please respond." Defendant sent another e-mail on the same day stating, "Miss the shit out of you" and then offered to take her on a paid vacation. The victim suspected it was defendant who stole her perfume and responded, "Give me my perfume back and I'll consider seeing you." Defendant initially denied taking the perfume, stating he would buy her a new bottle, but the victim stated she would not talk to defendant until her perfume "appears." The victim received her perfume back the following day, which was about two weeks after the initial break-in. The victim then asked why defendant went through the trouble of climbing through her second story window in order to steal the perfume, to which he responded, "Smells good like you. Knew how much you desire it."

The process of recovering her passport was similarly drawn out and tortuous. Initially, defendant denied having stolen anything else. On December 12, he e-mailed the victim, "Found something very important. Documentation." He continued to be coy about what exactly he had "found." When the victim asked, he replied by e-mail, "It's your _____. Can you answer me one question?" She replied, "Seriously, Josh, what are you trying to accomplish here?" He responded, "It starts with a P and it's not panties. Do you have a new boy? Just curious." At this point the victim figured out it was her passport. She asked when he planned on giving it back, to which he replied, "When you answer my other question." This sort of back and forth continued until the victim capitulated, stating, "Give me back my belongings and I will tell you whatever you want to know." A couple days later defendant finally gave the victim her passport.

Defendant testified on his own behalf at trial. Between November 15 (the last day he and the victim were together) and November 26 there was no communication between them. On Thanksgiving day he drank heavily. He decided to get his lighter,

vaporizer, and clothes back from the victim's apartment. He tried to enter through the front door, but it was locked. Instead, he climbed along a narrow ledge on the exterior of the second story and broke in through a window. He claimed that he had no intention of stealing the victim's property when he entered the apartment. But he looked around and did not find his property. So he decided to take her property "to lure her to give me my property back . . . ." He did not contact her again until the e-mail exchange described above on December 10.

On cross-examination defendant admitted he never asked for his lighter or vaporizer back in the e-mails he and the victim exchanged after the break in. That became a central focus of the prosecutor's closing argument: if he was truly motivated to retrieve his property, surely he would have mentioned that somewhere in the e-mails. Instead, the People argued defendant was motivated to steal the victim's stuff to remind him of her and to force her to talk to him.

DISCUSSION

Defendant raises a single issue on appeal: that CALCRIM No. 361 was given to the jury in error. CALCRIM No. 361 states, "If the defendant failed in [his] testimony to explain or deny evidence against [him], and if [he] could reasonably be expected to have done so based on what [he] knew, you may consider [his] failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure." As defendant concedes, he did not object to this instruction at trial. The People contend the issue has been forfeited.

"The appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant

were affected thereby." (§ 1259.) "Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. [Citations.] The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights." (*People v. Franco* (2009) 180 Cal.App.4th 713, 719.) Defendant does not contend CALCRIM No. 361 is an incorrect statement of the law; he contends it affected his substantial rights.

"'Substantial rights' are equated with errors resulting in a miscarriage of justice under *People v. Watson*[, *supra*,] 46 Cal.2d 818." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465; see *People v. Anderson* (2007) 152 Cal.App.4th 919, 927 ["Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under [*Watson*]"]; see also *People v. Anderson* (1994) 26 Cal.App.4th 1241, 1249 [same].) Under *Watson*, an error is prejudicial if, after reviewing the entire record, the Court of Appeal forms the opinion that it is reasonably probable that a result more favorable to the defendant would have been reached absent the error. (*Watson, supra*, 46 Cal.2d at p. 836.) This, of course, is the same standard we would apply in assessing prejudice on the merits.[3] (*People v. Jandres* (2014) 226 Cal.App.4th 340, 359.)

We conclude there was no prejudice here.

We begin with the language of the instruction. It starts with "if." At the very outset, the instruction is not telling the jury that the defendant failed to explain or deny anything. That is up to the jury to decide. *If* it finds the defendant failed to explain

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[3] The logical conclusion of this standard is that instructional error is never truly forfeited. If we find no prejudice, then defendant would not have prevailed on the merits in any event. And if we do find prejudice, we analyze the merits. Either way, defendant effectively gets a ruling on the merits.

or deny something that common sense says he should have, then the jury "may consider" that failure. So even if the jury finds the predicate to be true, it still does not have to do anything. The instruction simply allows the jury to do something. To do what? Consider it. That is a rather innocuous suggestion. The instruction then goes on to qualify this already qualified language: that failure is not enough to prove guilt. The People still have to satisfy their burden of proving the crime beyond a reasonable doubt. And if all of those qualifications were not enough, the instruction provides one more: it is up to you to decide the meaning and importance of any failure to explain.

As other courts have concluded, this language simply is not enough to satisfy the *Watson* prejudice standard in most cases. After reviewing caselaw discussing an analogous instruction, CALJIC No. 2.62, the court in *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1472, concluded, "Although . . . courts have frequently found giving CALJIC No. 2.62 to constitute error, we have not found a single case in which an appellate court found the error to be reversible under the *Watson* standard."[4] We have likewise not found a single case finding the giving of CALCRIM No. 361 to be prejudicial error.

Not only does the text of CALCRIM No. 361 render it inert, but the substance of the instruction itself is simply common sense that jurors would likely apply

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[4] CALJIC No. 2.62 is, if anything, less propitious toward defendants than CALCRIM No. 361. CALJIC No. 2.62 states, "If you find that [the] . . . defendant failed to explain or deny any evidence against [him] . . . introduced by the prosecution which [he] . . . can reasonably be expected to deny or explain because of facts within [his] . . . knowledge, you may take that failure into consideration as tending to indicate the truth of this evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable. [¶] The failure of a defendant to deny or explain evidence against [him] . . . does not, by itself, warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt. [¶] If a defendant does not have the knowledge that [he] . . . would need to deny or to explain evidence against [him,] . . . it would be unreasonable to draw an inference unfavorable to [him] . . . because of [his] . . . failure to deny or explain this evidence."

even in the absence of an instruction. As every parent has experienced, when a child disclaims any knowledge of a missing cookie but cannot explain the smear of chocolate around his or her lips, no formal instruction is needed to draw the obvious conclusion. So, too, with defendants testifying to their innocence but failing to explain inculpatory evidence. The jury is going to draw an inference of guilt regardless of an instruction. The instruction, if anything, is beneficial to the defendant because it tempers the instinct to immediately jump to the conclusion of guilt.

Finally, there is nothing about this case that renders it particularly susceptible to being influenced by CALCRIM No. 361. The jury did not ask about it.[5] The prosecutor did not mention it in closing. The prosecutor's emphasis was on defendant's failure to mention his property—supposedly his motive for breaking in—in the e-mails defendant exchanged with the victim in the weeks after the break in. The prosecutor did not focus on defendant's failure to explain anything while on the stand. Defendant contends the instruction was prejudicial because the case turned on defendant's credibility. But that is not enough. As we discussed above, there is nothing in CALCRIM No. 361 that would tend to nudge the needle toward an adverse credibility inference. (See *People v. Vega* (2015) 236 Cal.App.4th 484, 502 ["CALCRIM No. 361 does not direct the jury to draw an adverse inference"].) Its language is neutral in that regard.

Because we conclude CALCRIM No. 361 was not reasonably likely to affect the outcome of the trial, it did not affect defendant's substantial rights. That means

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[5] The jury did ask three questions. "(1) Our question is: Does the defendant have to have the intent to steal specific items, or simply the intent to steal any objects that don't belong to him? [¶] (2) If his intent was to steal back items that he thought belonged to him, is that intent to burglarize? [¶] (3) Can the intent occur after entry, or does the defendant have to come into the premises with the intent and steal what he intended?" These astute questions do not indicate any particular attention to CALCRIM No. 361 or defendant's failure to explain something on the stand.

his failure to object to it results in a forfeiture of the issue on appeal. It also means he would have lost on the merits anyway.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

GOETHALS, J.